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No. 135

In the Supreme Court of the United States

OCTOBER TERM, 1967

CHENG FAN KWOK, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent joins petitioner in urging reversal of the decision below. An *amicus curiae* was appointed by this Court to support the judgment of the court of appeals (390 U.S. 918). Our principal brief was filed sufficiently early to permit the *amicus* to respond to the points there made. The instant paper is filed in reply to the brief of the *amicus*.

I. THE STATUTE IS NOT RESTRICTED TO THE REVIEW OF ORDERS RESULTING FROM QUASI-JUDICIAL ADMINISTRATIVE PROCEEDINGS

The *amicus* brief resurrects and elaborates the hypothesis that the exclusive review procedure prescribed by Section 106(a) of the Immigration and

Nationality Act relates only to determinations made in quasi-judicial proceedings. The only relevant authorities cited (Br., p. 31) to support this contention are three lower court cases whose holdings were effectively repudiated by this Court's decision in *Foti* v. *Immigration & Naturalization Service*, 375 U.S. 217. We submit that the view suggested misapprehends the statutory plan as well as the nature of the administrative process and of judicial review of administrative determinations, and that its acceptance would "not comport with the declared purpose of § 106(a) to eliminate the District Court stage of the judicial review process in an effort to prevent dilatory tactics" (*Foti*, 375 U.S. at 230).

Heavy reliance is placed on the Hobbs Act (now 28 U.S.C. 2341–2352), the procedures of which were in large measure adopted by reference in Section 106(a). The Hobbs Act deals with review of the decisions of regulatory agencies, which often develop voluminous records. Congress recognized in Section 106(a) that different procedural patterns are found in deportation cases, and prescribed explicit modifications of Hobbs Act procedures. But we do not urge these differences as controlling. On the contrary, it seems to us that the purposes behind the Hobbs Act and Section 106(a) are the same. This is confirmed by the legislative materials quoted by the *amicus* (Br., pp. 22–23), which speak of the need "to obtain a speedy settlement of disputed questions" portrayed in the administrative record, and of avoiding "the delay and expense consequent upon a lawsuit in the district court

and appeal from that court's action to the circuit court of appeals." The scope of judicial review described in these legislative materials is consistent with the historic pattern of review of administrative determinations, including those in immigration cases. It is also consistent with the specification in Section 106(a)(4) that "the petition shall be determined solely upon the administrative record." The protagonists of the Hobbs Act and of Section 106(a) were equally convinced that district court review would add nothing except "delay and expense."

The supporting cases cited by the *amicus* (Br., pp. 24–25) merely found that direct review would be inappropriate in the absence of an adequate record. That would certainly be true of any judicial review, whether it is sought in a court of appeals or a district court. Since the court's review ordinarily is confined to the record on which the administrative agency acted, an essential of such review is a record adequately showing the basis for the agency's determination. See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167–168.

The error of the *amicus* brief, as we see it, is in assuming that an adequate administrative record can be developed only in a quasi-judicial hearing. In *Foti*, the Court specifically recognized "that deportability is conceded in a large number of cases," but stated that "this fact hardly detracts from our view as to a proper interpretation of § 106(a)" (375 U.S. at 227). Accordingly, review under Section 106(a), even under *Foti*, relates primarily to a variety of discretionary

determinations with regard to which the quasi-judicial hearing provisions of Section 242(b) are made applicable generally only by regulation, and not by statute, which limits the section's terms to determinations of deportability.

In addition, a subsidiary error of the *amicus* is the belief that "most determinations respecting discretionary relief are now passed upon in the Section 242(b) proceeding" (Br., p. 37). The fact is that during fiscal year 1967 there were 19,214 deportation hearings (1967 Annual Report, Immigration and Naturalization Service, p. 20), while there were 993,324 applications for various types of discretionary relief (*id.*, p. 7). The vast majority of such applications are adjudicated informally, through the submission of an application and supporting documents, followed by a determination by the appropriate district director (see, *e.g.*, 8 C.F.R. 204.1, 204.2, 212.7(a), 214.2(f) (2) and (3), (h), (j), 214.3). This informal procedure is fair, inexpensive and expeditious, and beneficial both to the applicant and the government. It also satisfies any applicable due process requirements. See *Montgomery* v. *Ffrench*, 299 F. 2d 730 (C.A. 8); *Ambra* v. *Ahrens*, 325 F. 2d 468, 471 (C.A. 5); *Maggibre Bakery, Inc.* v. *Esperdy*, 238 F. Supp. 374 (S.D.N.Y.); *Weiss* v. *Esperdy*, 27 F.R.D. 269 (S.D.N.Y.).

In passing upon such applications, the district director is required to give the applicant ample opportunity to substantiate his application, to advise him of adverse evidence, and to afford him an opportunity to present rebutting evidence (8 C.F.R. 103.2). When

there is an adverse decision it must be in writing, reciting specific reasons for the denial. And the applicant usually has an administrative appeal from such denials (8 C.F.R. 103.3). Moreover, when such a discretionary application is denied, the applicant can, and frequently does, challenge the denial in a judicial review proceeding. *E.g., Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8) (denial of waiver to exchange visitor); *Mrvica* v. *Esperdy*, 376 U.S. 560 (denial of registry); *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C.A. 7) (denial of visa petition). The record before the court of appeals, whether on direct review or on appeal from a district court, is the record made in the informal administrative proceeding. This record, which fully depicts the basis for the administrative action, affords the courts an adequate opportunity to perform their function—usually to determine whether there was an error of law or an abuse of discretion. Instead of presenting difficulties for appellate courts, as the *amicus* brief supposes, such records are much less burdensome, since the issues are presented simply and clearly, and without the massive volume of materials customarily produced in the proceedings of regulatory agencies.

A basic fallacy in the *amicus* brief is the apparent assumption that district court review would add something of significance to the record which would be available for review by a court of appeals should an appeal ensue. Presumably, the thought is that the district court would be authorized to conduct some kind of evidentiary hearing. This is not so. Under the

statute, discretion is to be exercised by the Attorney General and not by the courts. *Hintopoulos* v. *Shaughnessy,* 353 U.S. 72; *Foti,* 375 U.S. at 228. Except as to non-frivolous claims to American citizenship (*Ng Fung Ho* v. *White,* 259 U.S. 276), a reviewing court has no authority to conduct a *de novo* hearing in reviewing a discretionary determination of the Attorney General. *Obrenovic* v. *Pilliod,* 282 F. 2d 874, 876 (C.A. 7). This concept is emphasized in Section 106(a)(4) and (5). Moreover, the Hobbs Act has additional provisions for remand to the agency or to a district court when clarification or amplification of the record is required (28 U.S.C. 2347(b) and (c)).

The unsoundness of the *amicus* brief's speculations is demonstrated when they are viewed against the actualities of the instant case. It is suggested (Br., pp. 27–28) that the record is sparse, but in fact it fully depicts the basis for the applicant's motion and the district director's determination. No enlargement of the record will result if the case is sent to the district court. On similar records, other courts of appeals have had no difficulty in assessing the administrative determinations. See *Mui* v. *Esperdy,* 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017; *Lee* v. *Immigration & Naturalization Service,* 375 F. 2d 723 (C.A. 9), certiorari denied, 389 U.S. 856. Moreover, the same kind of informal record would be considered by a court of appeals in reviewing antecedent determinations, which the *amicus* brief agrees should be reviewed along with the basic deportation order (p.

41). And here it seems manifest that, aside from the jurisdictional question, the court below could readily have decided this case, in which the merits had already been briefed and argued, on the record before it.

In these circumstances, we cannot see that any judicial or legislative purpose would be served, except to interpose another step of review, by initially relegating a case like the present one to a district court. That court would have to review the same record, and to consider the same briefs and arguments as a court of appeals. And after the district court had rendered its decision the case would in all likelihood be back in the court of appeals for its review on the basis of the same record.

In urging that the special inquiry officer's role is crucial, the *amicus* asserts that the district director is a "subordinate agency official" (Br., p. 28). This is inaccurate, since the district directors are important officials in the administrative organization, who are superior to the special inquiry officers in grade and authority, and have many adjudicative responsibilities. See 8 C.F.R. 103.1(f); 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed. 1966), Sec. 1.9c. Pursuing the same theme, the *amicus* asserts that it is important to relate Section 106(a) to proceedings before a special inquiry officer because in such proceedings "the full range of procedural requirements of Section 242(b)" would be controlling (Br., p. 27). This is a demonstrably erroneous conception. If the regulations were amended to require that all applications for stays of deportation be addressed to the spe-

cial inquiry officer, he would act on substantially the same documents as those presented to the district director. The record reviewed by the court of appeals would be basically the same as that presented here, except that the administrative official making the initial decision would have a different title. Indeed, the same type of record is made in relation to motions to reopen, which are addressed to the special inquiry officer or the Board of Immigration Appeals and are reviewable by the court of appeals under *Giova* v. *Rosenberg,* 379 U.S. 18.[1] In each instance, whether reopening or stay is sought, there would be an application seeking to vitiate or delay the deportation order, and in passing on the application the official to whom it is presented would act on the papers submitted. There is hardly any justification for holding an evidentiary hearing whenever there is a motion to stay deportation or to reopen the proceedings. Such a consequence would produce far more obstruction and confusion in the deportation process than the bifurcated judicial review we are contesting here.

In summary, we believe the speculations regarding the need for a quasi-judicial hearing are strained and unsound. The important consideration, as we see it, is the need to effectuate the design of Section 106(a) "to abbreviate the process of judicial review of de-

[1] It is somewhat difficult to understand why the *amicus* finds our reliance on *Giova* "rather startling" (Br., p. 16). Albeit in a one-sentence *per curiam* opinion, *Giova* resolved the closely related question of the applicability of Section 106(a) to denials of motion to reopen in favor of review in the courts of appeals.

portation orders" (*Foti*, 375 U.S. at 224). This design can only be achieved, in our view, by reading the statute as requiring direct review in the court of appeals of determinations relating to or affecting the execution of deportation orders.

II. THE MOST SIGNIFICANT ASPECTS OF THE LEGISLATIVE HISTORY FAVOR RESPONDENT'S POSITION

Like the statutory language, the legislative history is neither wholly clear nor entirely satisfactory. We do not regard floor debates as the best guide to legislative intent, particularly when they do not deal directly with the question at issue. But we believe the *amicus* brief's examination of the legislative history has produced no credible evidence to support its hypothesis that Section 106(a) is concerned only with review of determinations made incident to quasi-judicial proceedings. On the contrary, as this Court's opinion in *Foti* demonstrates, the attention of Congress was focused primarily on preventing obstruction of deportation through dilatory judicial review rather than on the form of the administrative proceeding being reviewed. We would hardly regard Representative Walter's cursory response to Representative Libonati's uninformed question (Br., pp. 32–33) as evidence of anything. More persuasive, in our view, are the colloquies between Representatives Lindsay and Walter (set forth in Appendix C of the *amicus* brief), which assume that the final deportation order will include "further administrative relief" obtainable only after entry of the basic order.

The *amicus* dismisses (Br., p. 34) the reference chart in the House reports—a legislative summing-up which, in our view, weighs heavily against the suggested restrictive interpretation of the statute. Significantly, the *amicus* brief ignores this Court's reference to and reliance on that chart in *Foti* (375 U.S. at 226). Certainly, a chart appended to a Committee report dealing with judicial review of orders of deportation—described by the report as "a chart outlining administrative procedures in deportation cases" and captioned "Deportation Case Procedures"—cannot lightly be characterized as irrelevant to the legislative purpose. On the contrary, we submit that the chart constitutes direct and convincing evidence of the legislative aim to deal with the deportation process in its entirety and thus to forestall dilatory challenges to deportation orders.

Nor can we accept the *amicus'* disparagement (Br., pp. 45–46) of this Court's finding in *Foti* that the "key feature" of the legislative plan "was to abbreviate the process of judicial review of deportation orders" by eliminating review in the district courts. Obviously, Section 106 included other provisions; but there is no reasonable basis for disputing this Court's observations that "the declared purpose" (375 U.S. at 230) and "controlling intention" (*id.* at 232) of Congress were to vest exclusive jurisdiction in the courts of appeals. This objective is unmistakably expressed in Section 106(a)'s declaration that review in the courts of appeals "shall be the sole and exclusive procedure." It is likewise expressed in constantly repeated observations, in the Committee reports and the floor debates,

that in order to combat dilatory challenges to deportation orders, "a single, separate, statutory form of judicial review" was being created. In response to the *amicus* brief's surprising suggestion that Section 106(a) was not primarily aimed at expedition (Br., p. A–1), we invite attention to Representative Walter's exposition in the House Hearings on his bill. He remarked that the bill would set up "a single, expeditious, and fair method of judicial review in accordance with the time-tested" Hobbs Act, and stated: "What is important is to expedite the final decision on any such claim, once and for all" (House Hearings, cited in our principal brief, p. 12, n. 7). There are many similar expressions throughout the legislative history.

III. ADOPTION OF THE RESTRICTIVE VIEW WOULD EFFECTIVELY DEFEAT THE CONGRESSIONAL PURPOSE

In supporting a restrictive reading of the statute, the *amicus* brief offers a number of suggestions to avert the undesirable practical consequences which would result. We respectfully submit that these suggestions are in the main unrealistic and unsound.

The suggestions are preceded by two erroneous assumptions. First is the statement that when there are issues of fact the case can be remanded to the district court for trial *de novo* (Br., pp. 36–37). We have already observed that this is not so, since judicial review is confined to the administrative record, save for the exceptional situation, recognized in Section 106(a), when a trial *de novo* is required on a nonfrivolous claim of American citizenship. In the extremely rare situations where amplification or clarification of the record is required, the case is remanded

to the administrative agency for this purpose. See *Tejeda* v. *Immigration & Naturalization Service,* 346 F. 2d 389 (C.A. 9); *Attorney General* v. *Bufalino,* 371 F. 2d 738 (C.A.D.C.).

Moreover, we fail to grasp the point of the argument (Br., p. 37) that district court review is still allowed in habeas corpus proceedings, as recognized by the statute and required by the Constitution. Since earlier judicial review has been afforded through other remedies, habeas corpus proceedings are now infrequent (see Br., pp. B–1, B–3). Moreover, Section 106(a) contains safeguards against repetitious review in habeas corpus proceedings. The examples of district court review given by the *amicus* brief represent a minute proportion, rather than a "large block," of the total volume of judicial review proceedings. In any event, the possibility of district court review in rare cases hardly means that it should be extended to other cases, contrary to the design of Section 106(a).

The second erroneous assumption of the *amicus* is that "much less is at stake in this case than was in *Foti* * * * since by regulation most determinations respecting discretionary relief are now passed upon in the Section 242(b) proceeding" (Br., p. 37). We have already demonstrated the fallacy of this assumption. Moreover, it is also a fact, evidenced by Appendix B to the *amicus* brief, that the heavy preponderance of current litigation is concerned with challenges to ancillary determinations such as that presented here. In large measure, the dilatory obstructions to the execution of deportation orders currently occur

incident to judicial review relative to such ancillary determinations.

The *amicus* brief shares the view of the Ninth Circuit that all problems of interpretation could be solved by amending the regulations to consolidate all issues in one proceeding. And it urges (Br., pp. 43–44) that the Court should read Section 106(a) restrictively, so that respondent "will have an incentive to amend its regulations." We doubt that this proposal offers a rational basis for interpreting the statute. We discuss in our principal brief (pp. 39–43) the practical obstacles to a complete consolidation of procedures. Moreover, we fail to see how a requirement that a motion to stay deportation must be considered by a special inquiry officer rather than a district director alters its relationship to the deportation order or serves any relevant need.

The *amicus* brief also suggests (p. 38) that the regulations could be amended to provide an appeal to a special inquiry officer from a district director's adverse decision, and an additional appeal to the Board of Immigration Appeals, "with all of the procedures of Section 242(b) coming into play at that point." But this would involve the type of dilatory procedure which is patently undesirable in connection with last-minute motions to stay deportation. It is obvious that such a procedure would have serious consequences for the effective enforcement of the deportation laws. Its acceptance would mean that one who, like petitioner, has had full hearings and appeals and who finally is faced with deportation could be assured of a new

round of administrative hearings and appeals merely by filing a motion to stay deportation. Such a proposal would proliferate the delays in executing deportation orders, instead of minimizing them.[2]

Finally, we note the *amicus'* statement (Br., p. 44) that the view espoused should be adopted in order to promote "a simple and clear rule." If that were the critical consideration, it would have been an easy matter to subscribe to the lower court's approach in *Foti,* which was equally "simple and clear." A more relevant criterion, we submit, is whether the rule accomplishes the statutory goals. Nor do we acknowledge that the approach proposed in our principal brief is not equally "simple and clear." In any event, that approach at least has the added virtue, in our view, of fulfilling the statutory plan of minimizing dilatory

[2] We shall not comment extensively on the *amicus* brief's proposals regarding the problem of bifurcated review (Br., pp. 39–42), except to note our belief that the suggested solutions generally are unworkable. The *amicus* brief is mistaken in suggesting that district court review would necessarily be in the same circuit as review under Section 106(a), and that our principal brief cited no examples of bifurcated review. We cited two examples of bifurcated review proceedings against the Attorney General in the District of Columbia. Additional examples could have been cited, and more such review proceedings against the Attorney General in the District Court of the District of Columbia doubtless would result from a decision upholding the view of the court below.

judicial review which obstructs the execution of deportation orders.[3]

Respectfully submitted.

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APRIL 1968.

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[3] It should be noted that, on March 21, 1968, the Court of Appeals for the District of Columbia affirmed the district court judgment of dismissal in *DeLucia* v. *Attorney General*, No. 21,030 (C.A.D.C.) (discussed extensively at p. 28, n. 15, of our principal brief), making that court one of those favoring the broad interpretation of Section 106(a) which we here urge. In that case the court's brief opinion referred to this Court's decisions in *Foti* and *Giova*, and then stated:

> Thus, the act by the Chicago District Director which appellant seeks to review is clearly subject to the limitation on judicial review of § 106(a) and can only be considered by the Court of Appeals for the Seventh Circuit.

It should also be noted that a petition for certiorari was recently filed in *DeLucia* (No. 1358, this Term).

U. S. GOVERNMENT PRINTING OFFICE: 1968